In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 157

MONDAKOTA GAS COMPANY, a corporation; MONTANA UTILITIES GAS COMPANY, a corporation; BOWDOIN GAS COMPANY, a corporation; THE HEART MOUNTAIN SYNDICATE, a voluntary association; and FLETCHER EDWARDS, PETITIONERS

v.

THE FEDERAL POWER COMMISSION, AND MONTANA-DAKOTA UTILITIES COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the presiding examiner (R. 14-26) and the order of the Federal Power Commission affirming his decision (R. 34) are not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-7a) is reported at 232 F. 2d 358.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1956 (Pet. App. 8a). The petition for a writ of certiorari was filed on June 11, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Prior to amendment in 1953, Section 28 of the Mineral Leasing Act, 41 Stat. 449, 30 U.S.C. 185, read in pertinent part:

> Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 181 of this title, to the extent of the ground occupied by the said pipe line, and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable, * * *.

The provision added to Section 28 of the Mineral Leasing Act by amendment in 1953, 67 Stat. 557, reads as follows:

That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act, or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality: * * *.

QUESTION PRESENTED

Montana-Dakota Utilities Company, a natural gas company subject to regulation under the Natural Gas Act, had been granted rights-of-way over public lands for its pipelines. Prior to its amendment in 1953, Section 28 of the Mineral Leasing Act conditioned such grants on the requirement that the pipeline be operated as a common carrier. The question presented is whether the 1953 amendment to Section 28 operated to relieve Montana-Dakota of the obligation to serve as a common carrier.

STATEMENT

The Montana-Dakota Utilities Company (Montana-Dakota), a natural gas company subject to regulation under the Natural Gas Act, operates an integrated natural gas pipeline system in the states of Wyoming, Montana, North Dakota, and South Dakota, producing, purchasing, transporting, and selling natural gas in interstate commerce for resale. A part of its pipeline system runs through public lands, its principal lines in Montana, North Dakota, and South Dakota having been built under rights-of-way granted by the Secretary of the Interior upon the condition that the lines be operated as a common carrier under Section 28 of the Mineral Leasing Act, 41 Stat. 449, as amended, 30 U.S.C. 185,

supra, p. 2 (see Pet. 4, n. 1; R. 13). In a series of applications and complaints filed with the Federal Power Commission between July 23, 1953, and November 15, 1954, Montana-Dakota claimed to be relieved of its obligations as a common carrier of natural gas by virtue of the 1953 amendment to Section 28, *supra*, pp. 2-3 (R. 14-16).[1]

The Commission consolidated these proceedings and held hearings (R. 17). The presiding examiner held that Montana-Dakota had been relieved of its common carrier obligations by the 1953 amendment to Section 28 because that amendment applied to all pipelines operated by persons subject to regulation under the Natural Gas Act, irrespective of the date on which the rights-of-way were granted. Accordingly, the examiner, subject to Commission approval, dismissed or terminated the various applications, all of which depended on Montana-Dakota's duty to act as a common carrier (R. 14-26). The Commission affirmed that decision (R. 34).

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[1] Montana-Dakota filed three applications to suspend transportation service for certain companies over its pipeline system because of non-payment for past services; a gas tariff which would have substituted contract service in lieu of common carrier service; and a complaint against Mondakota Gas Company and others, alleging that the transportation of gas for those companies was in violation of Section 7(c) of the Natural Gas Act (52 Stat. 824, as amended, 15 U.S.C. 717f(c)). Each of these five proceedings was determined by the Commission's order holding Montana-Dakota to have been relieved of its common carrier obligations, as was an application by Mondakota Gas Company and Industrial Gas Company for a determination of the reasonableness of Montana-Dakota's gas tariff (R. 25). An application by Mondakota Gas Company for a certificate of public convenience and necessity authorizing it to sell natural gas to the Eastern Clay Products Company was dismissed for lack of jurisdiction since the proposed sale was not a sale for resale and was not, therefore, subject to the provisions of the Natural Gas Act (R. 25).

Petitioners, all of whom had appeared before the Commission, sought review of the Commission's order in the court below.[2] Affirming the Commission's order, the Court of Appeals rejected petitioners' contention that the 1953 amendment was intended to apply only to pipelines granted rights-of-way after its enactment. It concluded, contrariwise, that the exemption applies to the future operation of regulated pipelines and that it makes no difference whatever whether the pipelines were constructed on rights-of-way granted before or after the date of the amendment.

ARGUMENT

1. Prior to 1953, Section 28 of the Mineral Leasing Act (41 Stat. 449, as amended, 30 U.S.C. 185) required that rights-of-way for gas or oil pipelines across public lands be granted only "upon the express condition that such pipe lines shall be constructed, operated and maintained as common carriers * * *." In 1953, Congress amended this section by adding the proviso that (67 Stat. 557):

> * * * the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act, or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality * * *.

[2] In the Court of Appeals, the Commission and Montana-Dakota questioned the standing of petitioners to seek review, pointing out that none of them had present contracts with Montana-Dakota. The Court of Appeals ruled, however, that Mondakota Gas Company was a party aggrieved by the order (Pet. App. 3a-4a). In this brief in opposition, we confine ourselves to the merits.

As the court below held (Pet. App. 5a), the exemption depends solely upon a single fact: Whether the *operation* of the pipeline is contemporaneously subject to a specified form of regulation. If the operator is subject to such regulation, its pipeline is within the 1953 amendment and removed from Section 28's requirement to provide service as a common carrier. Since Montana-Dakota is concededly subject to regulation under the Natural Gas Act (Pet. 4), the holding that it is not subject to the common carrier provisions of the Mineral Leasing Act is clearly correct.

Contrary to petitioner's position (Pet. 11-12), nothing in the language of the amendment restricts its effect to pipelines thereafter granted rights-of-way over public lands. The amendment, in terms, exempts from "the common carrier provisions of this section" all regulated pipelines otherwise subject to those provisions. Despite the fact that the common carrier obligations are imposed as conditions of grants of rights-of-ways, these obligations, as emphasized by the court below, "are not requirements imposed initially, once and for all, like the payment of a fee; they are of continuing application" (Pet. App. 6a). They represent, as to each pipeline concerned, "a current, present requirement" (*ibid.*), and accordingly, the amendment cancelling their effect relieves each such pipeline of its common carrier obligations without regard to when it received its grant.

2. The 1953 amendment is not ambiguous. If it were, however, any doubt as to the correctness of the Court of Appeals' decision would be dispelled by the legislative history. It plainly appears that the amendment was adopted because Congress was of the view that, in

the natural gas field, common carrier obligations are inconsistent with those of a regulated utility. Thus, the House Interior and Insular Affairs Committee stated (H. Rep. 764, 83d Cong., 1st Sess., pp. 1-2):

> The inherent operating characteristics of a natural gas pipeline are incompatible with its operation as a common carrier. It is designed and operated to provide a continuous fuel service to its customers and not for the purpose of providing transportation service to others. If such a pipeline is compelled to furnish common-carrier service it is inevitable that its capacity to serve the public as a public utility will be impaired since it will be required to perform services in addition to and different from those for which it has been certificated.

Similarly, the Senate Interior and Insular Affairs Committee declared (Sen. Rep. 578, 83rd Cong., 1st Sess., pp. 1-2) that

> A natural-gas pipeline is designed and operated to provide a continuous fuel service to its customers and not for the purpose of providing transportation service to others. For example, a given pipeline may not have sufficient capacity to provide common-carrier service to the public.

The incompatibility thus noted in both houses has nothing to do with the date when a pipeline receives a right-of-way across Government lands. It exists for all. And it was the unmistakable purpose of Congress that the exemption should apply to all.[3]

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[3] The applicability of the amendment to pipelines with rights-of-way granted prior to the date of the amendment was clearly as-

Further demonstrating the congressional purpose to exempt all natural gas pipelines subject to rate regulation from Section 28's common carrier requirement is the ultimate rejection of an amendment, originally passed by the House, which would have continued the common carrier obligations with respect to gas produced upon Government lands in the vicinity of the pipeline and would have empowered the Federal Power Commission, upon the application of a producer of natural gas, to require a pipeline to transport or purchase the gas of that producer (see R. 19). This amendment was rejected by the Senate, and the Conference Report recommended that the House recede therefrom because of an agreement by the conferees that the amendment "would render ineffective the preceding clause, and perhaps nullify it." The Conference Committee re-emphasized that "the object of the legislation is to *relieve* certain pipelines used by regulated utilities from the common-carrier obligation for reasons conceded to be reasonable and just." (Emphasis added.) H. R. Rep. 1032, 83rd Cong., 1st Sess., p. 2.

3. Petitioners stress the rule of construction that a statute will not be presumed to have retroactive application unless a contrary intention is clearly indicated (Pet. 11). But assuming for the moment that the construction adopted by the Commission and the court below involved a retroactive application, the rule cited, which is only an aid in construction, would not govern, for, as we have shown, the statutory language and history manifest a purpose to cover, uniformly and even-

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sumed by both Committees in their reference to the Secretary of Interior's difficulties, culminating in *El Paso Natural Gas Company v. Chapman*, 204 F. 2d 46 (C.A.D.C.), in seeking to make Section 28 effective in regard to natural gas pipelines.

handedly, all pipelines, whatever their birth dates, which are subject to regulation under the Natural Gas Act. Moreover, as the court below recognized (Pet. App. 6a), retroactivity is not in fact involved. No legal relationship arising out of Montana-Dakota's required operation as a common carrier prior to the date of the amendment is disturbed; only the *future* operation of Montana-Dakota has been changed and only the inchoate expectations of petitioners have been affected.[4] Petitioners have no vested right that persons whose services they might wish to patronize be charged by Congress with particular obligations or be regulated in a particular fashion.

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[4] The fact that the amendment as here applied is not retroactive in the sense that the courts have used that term is shown by a comparison of the circumstances here and those in the cases upon which petitioners rely (Pet. p. 11): *United States* v. *Heth*, 3 Cranch 399 (Act reducing the fee of a customs collector on imported goods held inapplicable to goods imported and bonded before the effective date of the act); *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry.*, 266 U.S. 435 (extension of a statute of limitations during wartime held inapplicable to actions in which limitations had run prior to the date of the extending act); *Shwab* v. *Doyle*, 258 U.S. 529 (Act imposing an estate tax upon gifts made in contemplation of death held inapplicable to gifts made before enactment). In contrast to the expectations of petitioners, in each of these three cases the legal relationships involved had become fixed and definite at the time of the enactment of the statutes under attack.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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